19001-9

No. 33446-1-II

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

AMERICAN SAFETY CASUALTY INSURANCE COMPANY,

Appellant,

v.

CITY OF OLYMPIA

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This matter turns on whether the City waived certain requirements in its Contract with Katspan. American Safety does not argue the City made an express waiver. Rather, as explained in American Safety's opening brief, the City's waiver is implied by its conduct. Implied waiver by conduct is recognized in Washington.[1] The City argues there must be "unequivocal acts" evidencing an intent to waive.[2] However, whether the acts are unequivocal is a question for the jury to decide. The court in *Reynolds Metals Co. v. Electric Smith Construction & Equipment Co.* noted that waiver is commonly sought to be proved by evidence which does "not directly, unmistakably or unequivocally establish it."[3] In that instance, it

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[1] *Reynolds Metals Co. v. Elec. Smith Constr. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971).

[2] *Absher Constr. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 143, 890 P.2d 1071 (1995). *See* Brief of Respondent City of Olympia at 16.

[3] 4 Wn. App. at 700-01.

is for the jury to determine whether the intention to waive existed.[4] American Safety presented sufficient evidence of waiver to present the matter to a jury.

A. American Safety presented evidence that the City waived the suit limitation period.

The Contract required Katspan to file suit within 180 days from the date of final acceptance of the Contract. (CP 55) American Safety presented sufficient evidence to create an issue of material fact as to whether the City waived that requirement.

In its discussion of the suit limitation period, the City melds three principles—tolling, equitable estoppel, and waiver.[5] However, American Safety does not argue that tolling or equitable estoppel apply to the suit limitation period. The cases the City cites for those propositions, therefore, do not apply.

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[4] *Id.*

[5] Brief of Respondent City of Olympia at 23-25.

The court in *Carroll v. Hill Tract Improvement Co.*, a case cited by the City,[6] stated that settlement negotiations begun four years after the discovery of the facts upon which a claim was based did not "stay the running" of the statute of limitation, which was apparently three years.[7] The reasoning of that case does not apply here because American Safety does not assert that the City's actions stayed or tolled the suit limitation period.

Similarly, the City cites *Del Guzzi Construction Co. v. Global Northwest Ltd.*[8] for the proposition that a party is not estopped from enforcing a suit limitation period unless its actions caused the other party to delay filing suit.[9] Again, the reasoning of that

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[6] *Id.* at 23.

[7] *Carroll v. Hill Tract Improvement Co.*, 44 Wash. 569, 573, 87 P. 835 (1906).

[8] *Del Guzzi Construction Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986).

[9] Brief of Respondent at 24.

case does not apply because American Safety does not argue estoppel.

What American Safety does argue is that the City's actions evidence an intent to waive the suit limitation period. As pointed out in American Safety's opening brief, the City sent several communications to Katpsan and American Safety stating it would consider the claim if the necessary information was provided. (CP 331, 345-47, 349-50, 354-55, 357-59) The City even made mention of potential litigation, stating Katspan would be "required to produce all documentation, in whatever form, to ***substantiate any court claim.***"[10] (CP 331) The City also stated the information it was requesting from Katspan would "be available to LOTT ***if the matter is litigated.***"[11] (CP 358) These communications evidence an intent to waive the suit limitation period to allow American Safety to file a lawsuit.

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[10] Emphasis added.

[11] Emphasis added.

From among the many communications the City had with Katspan and American Safety, the City points to three letters it contends show it did not waive the Contract's requirements. In a letter dated April 2, 2001, the City stated it "reserved its right to demand strict compliance" with the Contract terms. (CP 338) In a letter dated April 18, 2001, the City stated that Katspan had waived its claim by failing to provide the required documentation. (CP 326-27) Finally, in a letter dated November 12, 2002, the City stated it was willing to negotiate with American Safety "without waiving any of its defenses." The City argues these letters demonstrate an "intent to seek a quick resolution and avoid" a lawsuit.[12] However, as explained above, American Safety also presented evidence demonstrating the City's intent to waive the suit limitation. Thus, the actual effect of the parties' communications is a question of fact for the jury. The trial court, therefore, erred in granting summary judgment.

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[12] Brief of Respondent at 19.

B. American Safety presented evidence that the City waived the Contract's notice and claim requirements.

1. The City waived the Contract's 15-day requirement.

The Contract required Katspan to make a written protest and to supplement the protest within 15 days with a written statement providing certain information. (CP 46) Following its submission of the request for equitable adjustment, American Safety did not satisfy the 15-day requirement. However, on April 23, 2003, the City set its own deadline for receiving the necessary information regarding the claim. (CP 357-59) Had the City intended to rely on the Contract's notice requirements, it would have denied the claim long before April 23, 2003. This communication, therefore, evidences an intent to waive the Contract's 15-day time requirement.

Similarly, after American Safety was unable to meet the deadline set in the April 23 letter, its consultant, Thomas Presnell, contacted the City's consultant, Paul Pederson, and

they exchanged emails regarding the additional information the City needed to assess the claim. (CP 412, 414, 416, 418-19) During this exchange Pederson stated he had "been given the green light to discuss the LOTT matter" with American Safety's consultant. (CP 414) This is further evidence that the City intended to waive the 15-day requirement. Had it intended to enforce the 15-day requirement, the deadline for submitting additional information would have long passed.

The City argues that Pederson could not waive the City's "defenses in a lawsuit," nor could he "bind Olympia to consider information provided by American Safety."[13] However, the question is not whether Pederson could waive the defenses. Rather, the issue is whether Pederson had authority to consider claim information and whether his communications with Presnell were made pursuant to that authority. The actual waiver of the Contract requirements was made by the City and

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[13] Brief of Respondent at 26.

Pederson's communications with Presnell simply expressed his knowledge of the City's waiver.

The required manifestation of Pederson's authority is present here. "With actual authority, the principal's objective manifestations [of authority] are made to the agent[.]"[14] Here, Pederson's statement that he had the "green light" to discuss the matter with Presnell is evidence that the City (the principal) made an objective manifestation to Pederson (the agent) that he had authority to consider additional information regarding the claim. The existence of an objective manifestation of actual authority is bolstered by Pederson's declaration submitted by the City in support of its summary judgment motion. (CP 372-73) Pederson testified that the City's attorney retained him to analyze the Request for Equitable Adjustment. (CP 372) Pederson was, therefore, considering information regarding the

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[14] *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991).

claim on the City's behalf. Thus, a jury could conclude that, when Pederson was communicating with Presnell, he had actual authority to consider additional information, thereby reaffirming the fact that the City had waived the 15-day requirement. The evidence presented is sufficient to put the question of Pederson's authority to the jury. Summary judgment was, therefore, inappropriate.

2. After waiving the 15-day requirement, the City refused to consider the information American Safety provided.

Based upon Pederson's statement that the City had given him the "green light" to consider additional information, Presnell spent a significant amount of time preparing the information for the City's consultant. (CP 404) However, after Presnell compiled the information, the City refused to consider it. (CP 370) The City argues that, by the time American Safety provided the additional information, it had already waived its

claim by failing to comply with the Contract's requirements.[15] However, as discussed in the previous section, the City had waived those requirements. At the very least, whether such a waiver occurred is a question of fact for the jury. Similarly, the jury must decide whether the only reason American Safety has not technically complied with the Contract's informational requirements is because City refused to consider the additional information when it was offered by American Safety. These issues cannot be decided on summary judgment.

C. *Mike M. Johnson* and *Dunlap* do not support entry of summary judgment on the facts presented here.

The facts of *Mike M. Johnson, Inc. v. Spokane County*[16] make that case inapplicable to the present matter. *Mike M. Johnson* involved several issues over which the parties disagreed,

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[15] Brief of Respondent at 28.

[16] *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003).

including a change order.[17] All the communications between the parties dealt with multiple issues, not just the change order. In addition, the County never expressly told Mike M. Johnson that it would consider information relating to the dispute about the change order. Rather, the County remained steadfast in its position that the contract requirements must be adhered to for a claim to be considered. Thus, the court concluded that the parties' continuing negotiations with regard to multiple issues did not waive the contract's claim requirements with regard to the change order.[18]

In contrast, the parties in the present matter were discussing one issue—the Request for Equitable Adjustment. Although the City made general references to its right to enforce the Contract's requirements, it also continued to set new dates by which American Safety was to submit additional information

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[17] 150 Wn.2d at 380.

[18] 150 Wn.2d at 404-05.

in support of its claim. The City's multiple communications regarding its continuing agreement to consider information relating to the claim should be presented to the jury, and it should determine whether the City's conduct waived the contract requirements.

Dunlap v. West Construction Co.[19] is likewise inapplicable. That case, decided in 1945, involved an employment agreement that required the employee to submit a written notice and proof of any claim for additional wages. The employee failed to do so. When the employee's attorney spoke to the employer's general manager, the manager asked for some details regarding the demand.[20] The court concluded this request was not a waiver of the contract's claim requirements.[21] However, in discussing waiver, the court actually used the language of estoppel. It

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[19] *Dunlap v. West Constr. Co.*, 23 Wn.2d 827, 162 P.3d 448 (1945).

[20] 23 Wn.2d at 830.

[21] *Id.*

noted that the employer made "no promise or suggestion of acquiescence in the demand" and that the employer did not cause "any loss or expenditures by appellant, which in good conscience should bar the right of the respondent to plead the procedural provision in the bar of the action. [The employee] was not misled."[22]

As previously explained, American Safety does not argue estoppel in this matter. Nonetheless, even if the reasoning of *Dunlap* actually applies to waiver as that term is used by modern courts, it does not mandate summary judgment in this matter. In *Dunlap*, the employer never told the employee it would actually consider claim information. In contrast, the City specifically told American Safety on more than one occasion that, if it provided certain information, the City would consider the claim. For example, on March 25, 2002, the City's attorney sent specific questions to American Safety's attorney, stating that

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[22] 23 Wn.2d at 830-31.

once the answers were received, the City could better analyze the claim. (CP 345) On August 2, 2002, the City's attorney stated the City had reviewed information provided, but needed additional submissions, which he specifically listed. (CP 349) He stated the additional information was needed "so that Lott can complete its review of Katspan's claim." (*Id.*) On April 23, 2003, the City's attorney reaffirmed the request for additional information. (CP 357-58) Finally, as previously discussed, the City's consultant informed American Safety's consultant he had been given the "green light" to discuss the claim. (CP 414) This is in sharp contrast to *Dunlap*, where the employer asked one question regarding the details of the claim and never stated it would even consider the claim.

The record in this matter establishes material issues of fact with regard to whether the City waived the Contract's requirements. A jury should determine whether a waiver was

intended. The summary judgment should, therefore, be reversed.

D. The award of attorney fees should be vacated and no additional fees should be awarded to the City.

Pursuant to RCW 39.04.240 and RCW 4.84.250, the prevailing party is entitled to an award of attorney fees. When the summary judgment is reversed, the City will no longer be the prevailing party and the award of fees should, therefore, be vacated. Similarly, because the City should not prevail on appeal, it is not entitled to an award of attorney fees on appeal.

II. CONCLUSION

For the reasons set forth above and in its Opening Brief, American Safety respectfully requests that the trial court's decision granting summary judgment in favor of the City of Olympia be REVERSED and that the order awarding the City its attorney fees be VACATED.

DATED April 14, 2006.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 14th day of April, 2006, I caused to be served Appellant's Reply Brief to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Tracy Horan

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